IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

W. A. NAILLING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 1042.

PETITION FOR REHEARING.

L. E. GWINN,
Attorney for Petitioner.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully asks a rehearing of his application for certiorari in this cause, and on the grounds hereinafter stated.

I.

This Court apparently overlooked the second question presented by the Petition (page 9) and discussed in the third reason assigned for granting the writ (Petition

pages 15, 16). For the convenience of the Court that question is re-stated in the margin.*

As we construe the decision of this Court in *Linder v. United States*, 268 U. S. 5, that question, premised on undisputed facts, should be answered in the negative, that is that there is no violation. But it must be answered in the affirmative if the conviction of Dr. Nailling herein is to be sustained. To answer it affirmatively is to disregard or to overrule the decision in the Linder case as it interprets the applicable narcotic statute with respect to the rights of physicians in prescribing narcotics for an addict.

If the Linder case is still an authoritative interpretation of the narcotic statute therein construed, it should afford protection to a physician, charged with a violation of Section 2554 of the Internal Revenue Code, when the acts for which he was convicted are well within his legal rights as defined by this court in that case. *If it is no longer the law, as administrative practices herein shown would seem to imply, and narcotic agents and government attorneys expressly claim, then it should be expressly overruled or modified and not allowed to operate as a judicial entrapment for physicians who believe that the construction of a federal penal statute by the Supreme Court should prevail over a conflicting interpretation thereof by administrative agents.*

To show that conflict and the consequences thereof in the instant case, reference will be made to undisputed

* (2) Whether or not it is a violation of the federal statute for a physician, consulted by an habitual user of narcotics who is suffering intense pain, to prescribe narcotics for the relief of such suffering, whether caused by addiction alone or that and some other disease, when the quantity prescribed is not in excess of the reasonable requirements of the addict for a period of twenty-four hours and there is no probability that any part thereof will be used, and in point of fact none was used, by any person other than the addict.

testimony in the record, and to show that this is not an isolated case of administrative nullification of rules pronounced by this court, we shall refer to material which the court may notice judicially.

As to the record in this case, it appears from undisputed testimony:

1. A druggist, testifying for the Government, was advised by a Federal Narcotic Agent that the law prohibited the filling of a prescription, issued by a physician to an addict (R. 216).

2. Many physicians refuse to treat addicts at all (R. 134, 139, 238). The basis of such refusal is the belief that the federal law prohibits a physician from prescribing narcotics for an addict who does not suffer from some affliction other than addiction, though the Linder case expressly holds to the contrary, and one of the medical experts, testifying for the Government, believing it would be a violation of federal law for him to do so, stated that he would not prescribe narcotics for an addict although he knew that death would be the consequence of such refusal (R. 134). Dr. McLaurin who thus testified was not only a government witness but had been a government employee (R. 133).

3. With respect to Dezonia, each prescription given him during the limited period for which he was treated by petitioner was for the "*Minimum*" dosage he required for a period of twenty-four hours (R. 176), this being about one-half of the amount he could take (R. 161), and in giving these prescriptions petitioner pursued the course followed by "reputable" physicians generally

when called upon to prescribe narcotics for *Dezonia* (R. 115, 116, 242, 244).

4. Dezonia was not only an "*incurable addict*" (R. 162, 163), but when deprived of the drug became "*upset and desperate*" (R. 239). Petitioner in prescribing for him for a limited period, or until he could complete his work and "get out of town," Dezonia being informed of this limitation and advised to enter a narcotic institution, which he agreed to do (162, 162), followed the identical course pursued by Doctor Fitts, Jackson, Tennessee, likewise a physician of the highest qualifications (R. 238, 239) and also well acquainted with Dezonia (R. 242-245).

5. Not only in the case of Dezonia, prescriptions to that addict being involved in the counts on which petitioner was convicted, but generally the practice of petitioner was in accord with that of other physicians (R. 45, 95, 244, 250). To emphasize this contention, we have set out in the appendix the pertinent testimony of both the witnesses for the government and for the defense on the point under consideration.

On the theory that it is the business of a physician to alleviate pain and suffering of patients as well as to effectuate a cure, and that a course of treatment for a limited period of time that would permit an addict to complete a work in which he was temporarily engaged so that he could then enter a narcotic institution, is a legitimate medical function, the attorney writing this petition would not have hesitated to advise petitioner that he had a perfect legal right under the applicable narcotic statute as construed by the decisions of this court to issue the prescriptions he gave Dezonia, but now he would advise any physician, asking an opinion as to his rights under

the narcotic laws, either to follow the course of Dr. McLaurin and refuse to prescribe for an addict at all or call the nearest narcotic agent and accept without question his interpretation of the statute without regard to any apparent conflict between that agent's interpretation and the opinion of this court in the Linder case.

If the record in this case disclosed an isolated instance of an administrative interpretation of the applicable narcotic statute in direct conflict with the decision of this court in the Linder case, such interpretation inducing many physicians to believe that they were not allowed to prescribe narcotics for an addict who did not suffer from some disease other than addiction, the deplorable consequences to petitioner might not present a question of general importance that would bring this case within the operation of the rule of this court, governing applications for the writ of certiorari.

But such is not the case.

In an address on House Joint Resolutions 642, delivered in the House of Representatives June 14, 1938, by Congressman John M. Coffee of Washington, reference is made to *administrative interpretations* of the narcotic law "*which is alleged to have set at defiance the clear decisions of the Supreme Court,*" the declaration being made with special reference to the holding in the Linder case.

Congressman Coffee's then statement of the narcotic problem constitutes the introduction (pp. XII-XXIII) to a work, entitled "Drug Addicts are Human Beings" by Henry Smith Williams, M.D., B.Sc., LL.D., and pub-

lished by the Shaw Publishing Co., Washington, D. C., in 1938.

"*We pay no attention to the Linder decision,*" is a statement from the witness chair, attributed to a federal narcotic agent at page 201 of that work. We set out in the margin the paragraph in which the above statement appears.*

According to the same work, the repudiation of the Linder decision is not restricted to field agents of the Bureau of Narcotics, but extends to employees of the Department of Justice. At page 201 it is stated that the cogency of that decision was expressly disavowed in the presence of the then Assistant Attorney General Joseph Keenan by a Mr. Fisher, introduced to the author as the "narcotic specialist of the Department of Justice," and at page 208 the author states that in the office of the Attorney General and in the presence of Mr. Keenan this same official stated that the "Linder decision of the Supreme Court (which denied Federal control over the practice of medicine) had been rescinded by later decisions." The paragraphs in which the foregoing statements appear are set out in the appendix.

We have made no investigation to determine the accuracy of the foregoing statements with respect to the repudiation of the Linder case. Similar statements have been made in other publications, having a wide circulation, but these are deemed sufficient to bring to the atten-

* "'We pay no attention to the Linder decision.' Such was the brazen statement, from the witness chair, of a narcotic agent, representing the Government, at the trial of a physician at Seattle, in August, 1936. I mention the date, because the avowal is thus shown to have been made seven months after the Supreme Court, in the A. A. A. decision, had shown that they pay a great deal of attention to that decision—inasmuch as it was quoted, and cited a second time with reiterated emphasis in the famous decision of January 6, 1936."

tion of the court a general unfortunate situation of which the instant case is a concrete illustration.

As to the Linder decision, it was the view at least of some of the Government attorneys, participating in the preparation of briefs filed in this case, that such decision had been to some extent modified by the decision in Boyd v. United States, 271 U. S. 104. As we construe the latter decision, it does not modify in any particular the decision in the Linder case. On the contrary it reaffirms it and clearly recognizes the right of a physician to prescribe narcotics to an addict either "for the purpose of curing disease or relieving suffering" (pages 106, 107 of the opinion).

In the Boyd case the "prescriptions were for quantities many times in excess of what, *according to any fair medical standard* (italics supplied), reasonably could be put into the possession of confirmed addicts, even when treating them for the addiction or endeavoring to relieve them from suffering incident to it" (p. 106 of the opinion).

One of the addicts in the Boyd case was given a single prescription in which the quantity of narcotics prescribed exceeded the total amount in the eight prescriptions issued Dezonia over a ten day period.

No prescription issued Dezonia was in excess of his daily requirement and the evidence expressly so shows (R. 161, 162, 172, 235).

Dezonia personally used all the narcotics prescribed for him by petitioner (R. 109). He had never been known to sell or give to others any portion of narcotics pre-

scribed for him (R. 245). Consequently, a physician who knew Dezonia and limited each prescription to that addict's daily minimum requirement could be reasonably certain that no part of the narcotics prescribed would be disposed of by Dezonia to any other person. A *reasonable probability*, not a bare possibility, is the test established by the Linder case. Measured by that test, petitioner violated no law when he issued the prescriptions to Dezonia. These prescriptions, issued to relieve the intense pain Dezonia suffered, restricted in quantities to his daily minimum requirement, issued under circumstances that precluded any probability of the disposal by Dezonia of any part of the drugs prescribed for him, and issued only for a limited period of time or until Dezonia could complete his temporary work and enter a narcotic institution, which he did, were well within the legal rights of petitioner as defined by the Linder case.

II.

At page 20 of its brief, opposing the petition for certiorari, the Government states that the "good faith of the physician is the determinative issue of fact," and that the jury determined that issue against petitioner. As that statement, although destitute of any fair basis of support in the record, may have been accepted without investigation by this Court, we shall briefly refer to the so-called issue of "good faith" as presented by the record in this case.

Petitioner, a licensed physician under the laws of Tennessee, and as such authorized to administer narcotics to or prescribe them for addicts (Tenn. Code, Secs. 6618-a, 6618-7, 6625, 6627; Friedman v. State, 141 Tenn. 553),

must in the absence of evidence to the contrary be presumed to have acted in good faith.

However, it is not necessary to rely on this presumption, the evidence, as elsewhere shown, affirmatively establishing Dezonia's need of narcotics and that the quantity prescribed was his "minimum" requirement when each prescription was issued.

The criticism, made by Government experts of these prescriptions, rests upon the assumption that petitioner did not have the right to prescribe narcotics for Dezonia at all. One of these experts, Dr. McLaurin, stated that if under the law "a doctor could prescribe for an addict, it would be left up to the doctor as to how much to prescribe." (R. 134.)

Neither the term "addict" nor "good faith" appears in the applicable statute (Sec. 2554, subsection c, paragraph 1, of the Internal Revenue Code), but reading the term "good faith" into that statute would not materially affect the scope of its operation. A mistake of judgment as to the need of a particular patient would not show bad faith nor tend to negative good faith.

Good faith in the use of narcotics by a physician requires neither more nor less than that the quantity prescribed be restricted to the personal needs of the patient and given in the belief that the use thereof will benefit the patient by relieving pain or otherwise improving his condition. That the quantity prescribed for Dezonia was not excessive and that petitioner believed he would benefit therefrom are affirmatively and indisputably established by the evidence (R. 161, 162, 171, 172).

This being true, and in the absence of any evidence to show a reasonable probability that any portion of the narcotics prescribed for Dezonia would be used by any other person, it must be held as a matter of law that petitioner acted in good faith when he issued the prescriptions to that addict.

If it be conceded that within the limits of a revenue act, a physician may not only be required to keep records of all narcotics administered or prescribed (there is no suggestion that such were not kept by petitioner), but also required to conform his practice to generally accepted or recognized medical standards, such a concession does not aid the Government contention on the issue of good faith.

There is not a scintilla of evidence that petitioner violated any recognized medical standard in issuing the prescriptions to Dezonia. On the contrary, the record shows that reputable physicians, consulted by Dezonia, followed substantially the same course as that pursued by petitioner in issuing the prescriptions involved in the counts on which he was convicted.

There being no evidence of bad faith nor evidence that any act of petitioner was intended to, or calculated to, interfere with the collection of internal revenue, it necessarily follows that his conviction can only be sustained by stretching a revenue act to the breaking point or acquiescing in a *de facto* regulation by the Federal Government of the practice of medicine by physicians licensed by the State of Tennessee. Due regard for constitutional mandates precludes such an acquiescence. Linder v. U. S. 268 U. S. 5; U. S. v. Butler, 297 U. S. 1.

Apparently this court overlooked the point that the conviction herein can only be sustained upon a theory that brings Section 2554 of the Internal Revenue Code in conflict with the 10th Amendment to the Federal Constitution.

Considering the record as a whole, it is obvious that the case was not tried on the theory that the acts of petitioner either directly or indirectly had any tendency to deprive the Government of revenue or to delay, impede, add to the cost of, or in any way affect the collection of revenue.

On the contrary, as a practical proposition, the case was tried on the theory that the statute was a regulation of the practice of medicine. In fact the greater part of the Government's expert testimony related to the proper medical treatment of menopause, cystitis, varicose veins, enteritis, sciatica, etc. (R. 126-132; 136-139; 143).

But that is not all. From the beginning to the end of the trial, both in the examination and cross examination of witnesses, the Government attorney, proceeding on the theory that the trial court was a clinic and jurors medical experts, sought to show:

(1) That narcotic cures could only be effected in an institution and that therefore it was not "professional treatment" to prescribe narcotics for an addict not under restraint; (2) that prescriptions to an addict not intended to effectuate a cure but to alleviate suffering incident to addiction did not come within the scope of the phrase "professional treatments"; (3) that in any case where the addict, regardless of other diseases, was not under restraint it was improper to prescribe narcotics in excess

of the amount necessary for a particular administration or taking of the drug (R. 109, 128, 133, 134, 135, 142, 143, 185, 239, 245).

The expert witnesses were asked as to what constituted "proper practice" in treating addicts (R. 128, 133, 142, 235, 239) these experts differing as to what constitutes such practice, *but there was neither inquiry nor evidence as to fair or generally accepted medical standards.*

There is no warrant in the Federal Narcotics Statutes for conducting a trial thereunder as a Juridical Clinic.

If petitioner's conviction did not result in his punishment for acts not within the scope of any Federal penal statute and that could not be brought within the operation thereof without a violation of the 10th Amendment, the failure of his trial counsel to particularize objections to the procedure followed and to move for a directed verdict might preclude the application of corrective processes by a reviewing court.

Under our system of jurisprudence, however, statutes, creating criminal offenses, are strictly construed, and before any person can be convicted thereunder, his acts must be "plainly and unmistakably within the statute." United States vs. Clark Brewer, 139 U. S. 278. A conviction for acts not included within the statute and that could not be brought within its scope without destroying its constitutionality, is a sheer denial of due process of law. Ex Parte Siebold, 100 U. S., 371, See also Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066.

A conviction for acts that are neither wrongful nor

criminal should not be sanctioned on account of some oversight or omission of counsel. In fact there is respectable authority to support the proposition that a new trial should be granted where the mistake of counsel is so serious that it may have deprived the accused of an important right. People vs. Schulman, 299 Ill. 125, 132 N. E. 530.

But be that as it may, Section 269 of the Judicial Code, so often invoked by the Government as a shield against error committed in its favor, should be so extended as to preclude an affirmance on technicalities.

CONCLUSION.

Petitioner has been successful in the practice of his profession. He is held in highest esteem by men and women in all walks of life (R. 230, 231). His work speaks for itself. For some reason, not disclosed by the record, he, among the physicians of the town where he lives, has been singled out for a narcotic prosecution, this being done although his narcotic prescriptions were in line with those issued by the other doctors in the community.

Preliminary to that prosecution, decoys, including a prostitute, instructed to make false representations as to their physical ailments, were sent to his office by narcotic agents.

But the basis of his conviction was a few prescriptions, issued to an unfortunate addict who was undoubtedly temporarily benefited and in no way injured by these prescriptions, these being issued from humanitarian and not mercenary motives (R. 162, 171, 172), and in the

exercise of what petitioner believed to be his legal rights as defined by the decisions of this court.

Petitioner has almost reached the allotted "three score years and ten." Standing in the evening twilight of his professional career, he seeks a hearing from this court not only to vindicate his professional conduct and avoid serving a prison sentence but also in the interest of the profession to which he belongs.

Many of its members believe, as he believes, that it is not only their right but their professional duty to prescribe narcotics in reasonable quantities for a limited period when necessary to alleviate intense suffering, whether caused by addiction or some other disease, or to prevent the collapse that might follow a sudden withdrawal of the drug from a confirmed addict.

Justice to the members of the medical profession imperatively requires that their rights and responsibilities be defined with reasonable certainty, and so defined that they may know whether it is safe to rely on the construction of a Federal penal statute by this Court that apparently has not been changed by its later decisions.

The publicity, including statements in the National Congress, given to charges that narcotic agents in the administration of the law have nullified the decision of this Court in the Linder case, and the consequences of such publicity as it affects the conduct of physicians, naturally desirous of avoiding the risks and consequences of a Federal prosecution, seems to call for a further construction of the applicable narcotic statute by this Court.

To sustain that faith in the judiciary that is so vital in our system of government, it is imperative that the courts keep faith with individuals whose rights they adjudicate and administer justice, not in accordance with the arbitrary will of any official or governmental agency, but under rules—reasonably clear in their meaning—fixed by law for the control of the citizen and the operation of government. Lynch vs. Klendolph, 204 Iowa, 762, 216 N. W. 2; United States vs. Pardue, 294 Fed. 543, 548).

Invoking the principle thus stated, petitioner respectfully requests that this Court reconsider its denial of the application for certiorari and grant the writ therefor as prayed in his original petition.

L. E. GWINN,
Attorney for Petitioner.

I, the undersigned L. E. Gwinn, attorney for the petitioner, do hereby certify that the foregoing petition for a rehearing is filed in good faith, and not for delay.

L. E. GWINN.